U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)

Issue Date: 19 December 2005

Case No.: 2005-LHC-0208

OWCP No.: 5-91751

In the Matter of:

DIANA G. ELEY,
Claimant,

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK CO.,
Employer,

and

DIRECTOR, OFFICE OF WORKERS'
COMEPNSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Administrator.

Before:
Daniel A. Sarno, Jr.
Administrative Law Judge

Appearances:
John Klein, Esq., for Claimant
Lawrence Postol, Esq., for Employer
Ronald Gurka, Esq., for Administrator

DECISION AND ORDER ON MODIFICATION

This proceeding arises from a Section 22 modification under the Longshore and Harbor Workers' Compensation Act ("LHWCA" or "the Act"), as amended, 33 U.S.C. §§ 901, *et seq*. Claimant, Diana Eley, was injured in the course of her employment at Newport News Shipbuilding and Dry Dock on April 15, 1993.

A formal hearing was held on July 12, 2005, in Newport News, Virginia.[1] The April 22, 2004, Decision and Order was marked as Joint Exhibit 1, and the hearing transcript from the February 10, 2004 hearing was marked as Joint Exhibit 2. Claimant submitted Exhibits 1 through 4, and Employer submitted Exhibits 1 through 55.[2] All exhibits were received into evidence without objection. Both parties filed post-hearing briefs. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

1. Is Employer entitled to a modification of the April 22, 2004, compensation order from an award of permanent total disability to permanent partial disability?

2. Is Employer entitled to partial relief from the Special Fund pursuant to Section 8(f)?

PROCEDURAL HISTORY

Claimant suffered a work-related right shoulder injury on April 15, 1993. Claimant filed a claim against Employer, seeking permanent total disability compensation for the period of March 22, 2000, through the present and continuing. Employer also made a claim for Section 8(f) relief. A hearing was on February 10, 2004, before Judge Fletcher Campbell[3]. The court heard testimony from Claimant, and reviewed the medical evidence from several physicians, including Dr. Hansen, Claimant's treating physician. The court described Dr. Hansen as a "board-certified psychiatrist and neurologist." (JX 1 at 5). Dr. Hansen wrote that Claimant would be unable to work a full-time job and could only work a part-time job if it were "extremely modified". The Employer presented testimony and the labor-market survey from a vocational expert. Employer's physician Dr. Ross approved the jobs identified by the labor market survey as suitable for Claimant. The prior judge noted that no physicians had totally ruled out the possibility of employment for Claimant. However, because Employer failed to consult Dr. Hansen, Claimant's treating physician, to determine whether the proposed jobs were suitable for Claimant, the court found that Employer had failed to demonstrate the existence of suitable alternative employment within the meaning of the Act. The court awarded Claimant permanent total disability from the period of March 22, 2000 through the present and continuing. Finally, the prior judge denied Employer's claim for Section 8(f) relief after determining that the

[1] The Director of the Special Fund did not attend the formal hearing but did submit a post-hearing brief.

[2] The following abbreviations will be used as citations to the record:
CX – Claimant's Exhibit
EX – Employer's Exhibit
JX – Joint Exhibit
Tr. - Transcript of July 12, 2005, hearing

[3] Judge Campbell has since retired; hence, this modification proceeding has been assigned to Judge Sarno.

opinion of Dr. Reid on the contribution issue constituted an undocumented opinion. The prior judge also assumed that Dr. Reid never personally examined Claimant.

Thereafter, Employer appealed and filed a Section 22 modification alleging a mistake of fact. The Benefits Review Board remanded the appeal to this court to first address Employer's Section 22 modification. In support if its modification, Employer has now inquired of Dr. Hansen's opinion regarding the jobs identified in the labor market survey. Employer contends that Dr. Hansen has opined that Claimant can work. Employer again seeks Section 8(f) relief. In support of its 8(f) application, Employer has also submitted evidence that Dr. Reid personally examined Claimant. Additionally, Employer has obtained a report from Dr. Apostoles in support of its 8(f) application.

Claimant contends that she remains unable to work in any capacity due to her work injury and associated pain. The Director opposes Employer's 8(f) application, arguing that Employer has again not satisfied the contribution requirement.

STIPULATIONS

1. On April 13, 1993, Claimant suffered an injury to her right shoulder arising out of and in the course of her employment.

2. The parties and the injury are covered by the Act.

3. An employer/employee relationship existed between the parties at all relevant times.

4. Claimant gave timely notice of injury to Employer.

5. Claimant filed a timely notice for compensation.

6. Employer filed a timely first report of injury and a timely notice of controversion.

7. Employer has provided Claimant with medical services as required by 33 U.S.C. § 907.

8. Claimant's average weekly wage at the time of her injury was $451.60, which results in a compensation rate of $301.07.

9. Employer has made voluntary payments of compensation to Claimant as reflected in the LS-208 dated March 18, 2003.

10. Claimant cannot return to her pre-injury employment.

11. Dr. Hansen is a board-certified neurologist, but is not a psychiatrist.

12. Claimant has not looked for work since January 1, 2002.

FINDINGS OF FACT

Claimant's Testimony[4]

Claimant's last job was a telephone survey job from her home. (Tr. 22). Claimant stopped working that job because she was in a lot of pain and found the job too stressful. (Tr. 23). Prior to that job, Claimant worked as an after-school childcare worker. (Tr. 24). Claimant stopped that job because she experienced pain in her shoulders. (Tr. 24). Prior to the after-school childcare worker position, Claimant worked part-time as an I.D. checker at the Langley Air Force Base Exchange. After the I.D. checker job was eliminated, Claimant worked as a cashier at Langley, but quit when she began to experience pain in her shoulder. (Tr. 26). Claimant also worked as a cafeteria monitor for a two year period from 1995 to 1997. Claimant quit because she believed she had to get a full-time job per the shipyard's instructions. (Tr. 44).

Claimant experiences a lot of pain on a daily basis. Claimant does not sleep well at night; sometimes she isn't able to sleep at all as a result of her pain. (Tr. 27). Claimant experiences headaches, and pain in her shoulder, neck, head, and back. (Tr. 28). Claimant experiences only a little relief from the medication and injections she receives. (Tr. 29). Claimant only cooks a little at home before taking a rest, and does very little housework. (Tr. 30). Claimant is able to go to the grocery store by herself, although sometimes she goes with another person. (Tr. 31). Sometimes Claimant is unable to grocery shop because of her pain. (Tr. 32). Claimant also experiences pain in her hips, knees, and arms. (Tr. 33). Claimant does not agree with Dr. Hansen's opinion that she is able to work certain jobs. (Tr. 34). Claimant could not get to any job five days a week to work a regular shift. (Tr. 34). Claimant expressed her disagreement with Dr. Hansen regarding his opinion that she can work. (Tr. 35).

Claimant volunteers at the YMCA in Hampton, Virginia, to watch children in the childcare room. (Tr. 36). Claimant has volunteered there since 2000. In exchange for her volunteer work, Claimant receives a membership to the pool where she is able to get a little exercise. (Tr. 37). Claimant watches anywhere from zero to twelve or thirteen children, although she does not watch that many children herself. Claimant is accompanied by one to four individuals at a time. (Tr. 37). Claimant watches children who are six weeks to four years old. (Tr. 37). Claimant watches the children from 1 to 3 hours at a time, although she often just lies down while she is watching the children. (Tr. 38). After she finishes her volunteer session, Claimant has been unable to use the pool for her therapy because she is in so much pain. (Tr. 51). She continues to do the volunteer work because it is her "only outlet". (Tr. 51). After Claimant returns home from the YMCA, she is in pain and lies down. (Tr. 52).

Claimant is able to drive a car and a full-size pick-up truck, although Claimant experiences pain while driving from sitting at an angle. (Tr. 42). Claimant was last examined by Dr. Hansen in 1999. (Tr. 43). However, when Claimant goes to Dr. Hansen's office for her

[4] During the hearing, Claimant was extremely upset as a result of her understanding of her case, her attorney's efforts, and her treatment by the shipyard. The Presiding Judge permitted her to make a statement on her own behalf after the parties had rested. Claimant's statement on her behalf was taken on the record and is reflected in the transcript at pages 54 through 71. However, Claimant's statement will not be considered as part of the evidence of record as Claimant merely argued her case and was not subject to cross-examination on the statements she made.

injections, she is often given those injections by other doctors, including Drs. Holzer and Little. (Tr. 47).

Medical Evidence

Dr. Thomas Stiles

Dr. Thomas Stiles treated Claimant for her 1993 right shoulder injury. Dr. Stiles performed an arthroscopy of Claimant's shoulder on May 26, 1994. (EX 18). Following her surgery, Claimant was given restrictions which included minimum use of the right hand, no reaching over the right shoulder, and lifting restrictions. (EX 18). Claimant continued to treat with Dr. Stiles throughout the 1990s for pain and difficulty associated with her right shoulder, elbows, hands, and arms. On November 17, 1998, Dr. Stiles issued permanent work restrictions for Claimant: (1) no lifting with right hand or right arm; (2) no work above shoulder level; (3) no foot controls except car/truck; (4) needs a break every 4 hours; (5) no impact tools; (6) no climbing; and (7) lift to 30 lbs., carry to 100 ft. with left arm. (EX 18).

Dr. Nancy Ayres

Dr. Nancy Ayres is Claimant's primary care physician. (EX 51). Dr. Ayres examined Claimant on January 25, 2005 when Claimant presented with a sinus infection. (EX 51 at 1). At that time, Dr. Ayres reviewed Claimant's medical and social history. (EX 51 at 1). In her chart note, Dr. Ayres noted that upon examining Claimant, there were no findings of arthalgias, back pain or myalgias. Claimant also did not present any psychiatric symptoms of anxiety, depression or sleep disturbances. (EX 51 at 1). When Claimant was next seen on February 1, 2005 for symptoms of fever and possible influenza, her ROS revealed no changes in her psychiatric or musculoskeletal condition from her last visit. (CX 51 at 3).

Dr. Glenn Nichols

Dr. Glenn Nichols is an orthopedist who has treated Claimant for knee pain. (EX 47). Claimant treated with Dr. Nichols in July 2003 for a re-evaluation of her knee pain. At that time, Dr. Nichols agreed with Dr. Ross' 2003 assessment that Claimant had reached maximum medical improvement and was able to return to some type of sedentary work. Dr. Nichols did state that Dr. Hansen should make an assessment of Claimant's psychological capability to work given her pain issues. (EX 47 at 3-4). Dr. Nichols saw Claimant again in January and May 2004. (EX 47 at 5-8).

Dr. Paul Mansheim

Dr. Paul Mansheim is psychiatrist who conducted several independent medical evaluations of Claimant. Dr. Mansheim is board-certified in general and forensic psychiatry and is currently in private practice at Riverpoint Psychiatric Associates in Norfolk, Virginia. (EX 29).

Claimant most recently participated in an independent medical examination with Dr. Mansheim on June 8, 2005. Previously, Dr. Mansheim evaluated Claimant on March 10, 2000 and August 8, 2003. (EX 28; EX 31). Following the March 2000 evaluation, Dr. Mansheim concluded that Claimant's psychiatric diagnoses were not related to a work-related injury. (EX 28 at 23). Dr. Mansheim noted that Claimant clearly had a pain syndrome, which he believed was related to both physical and psychological determinants. (EX 28 at 23). Dr. Mansheim also felt that it would be beneficial for Claimant to be active and working, and he felt that it was not necessary for Claimant to have work restrictions as a result of a psychiatric diagnosis. (EX 28 at 23). Dr. Mansheim reaffirmed these findings in his 2003 evaluation of Claimant.

Dr. Mansheim's June 2005 interview with Claimant revealed that her major problem is pain. According to Dr. Mansheim's notes, Claimant feels she cannot work because she has pain, sleeping problems, and headaches. (EX 55). Claimant stated that she would have to have less pain in order to return to work. (EX 55). Dr. Mansheim concluded:

> Ms. Eley's presentation was essentially similar to her presentation in August 2003. She herself does not identify any specific psychiatric difficulties that would preclude her from working. Her major problem, as she sees it, is pain. In my opinion, this is not a symptom of a psychiatric disorder. Therefore, it is my conclusion that Ms. Eley neither demonstrates a psychiatric disorder, nor complaints of psychiatric symptoms inconsistent with ability to function at an occupation level consistent with medical restrictions, education, training and experience. In particular, it is my assessment that Ms. Eley does not have a psychiatric disorder that precludes her from working full-time as a cashier, parking lot attendant, motel desk clerk, or ticket taker.

(EX 55).

Dr. Robert B. Hansen

Dr. Hansen is a physician who is board certified in pain medicine and neurology. (CX 4). Dr. Hansen has treated Claimant since July 1993. Upon examining Claimant for the first time on July 26, 1993, Dr. Hansen concluded that

> Ms. Eley has multi-fasciative pain syndrome. She has had documented nerve entrapment in the past and has been operated on for this. Complaints of pain in the wrist extending up the arm may relate to persistent median nerve entrapment. . . . I also believe that she has the elements of a myofascial pain syndrome which could be responsible for much of the difficulty in the neck and shoulders.

(EX 23).

Dr. Hansen continued to treat Claimant every few months from 1993 through 1999 for her bilateral carpal tunnel syndrome, myofascial pain, degenerative joint disease with shoulder derangement and sleep disorder. (EX 25). During her visits, Claimant would report recurring

pain in her hands, arms, neck, shoulders, knees, and hips. (EX 25). Dr. Hansen also documented Claimant's recurring difficulty with depression. During the October 31, 1997 visit, Claimant told Dr. Hansen that she would be experiencing a job shift from greeter to cashier the following week. (EX 25 at Cx ll). Dr. Hansen expressed reservations about Claimant's capabilities "being a cashier given [Claimant's] well-documented carpal tunnel syndrome." (EX 25 at Cxll). Dr. Hansen next treated Claimant on February 3, 1998, and noted that he thought Claimant did better working as a greeter than as a cashier. (EX 25 at Cxln). When Claimant treated with Dr. Hansen on September 2, 1998, she explained that Dr. Stiles removed her from her position as a cashier at the Langley PX. Dr. Stiles apparently recommended sedentary duties which weren't available at that time at the Langley PX. (EX 25 at CXlq). In January 1999, Dr. Hansen determined that, in response to an inquiry from Claimant's counsel, Claimant's chronic pain complaints and her depression rendered her unfit for work at that time. (EX 25 at CX1 aa). However, Dr. Hansen noted that the situation could be readdressed if Claimant were to become more psychologically stable. (*Id*.). In addition, Dr. Hansen referred Claimant to Dr. Ann Hammond, a psychologist working within Dr. Hansen's practice. Dr. Hammond treated Claimant for depression. (EX 25).

On August 27, 2004, Dr. Hansen met with William Kay, a vocational case manager who has worked with Claimant to help find her appropriate work. (EX 39). Dr. Hansen also reviewed the surveillance tapes taken of Claimant in 1999 and 2003.[5] Dr. Hansen described these videos as showing Claimant leaving her house, getting into a car, going into several stores for shopping purposes, and moving boxes off her porch into the house. Dr. Hansen saw no evidence on the video that Claimant was malingering. (EX 39). Accordingly, Dr. Hansen reviewed a number of job description provided by Mr. Kay. Dr. Hansen noted that the job descriptions involved extremely light duty work and that none of the jobs appeared unreasonable. Dr. Hansen then approved the job descriptions, which included a donation center attendant; greeter; customer service/surveyor; dispatcher; unarmed security guard; and cashier. (EX 39).

Dr. Hansen approved job descriptions again on February 28, 2005. (EX 48). At this time, he reaffirmed his prior approval of various job positions which involved extremely light duty work. Dr. Hansen again approved most of the job descriptions provided to him, including unarmed security guard; toll collector, cashier; and cafeteria monitor. (EX 48). Dr. Hansen did not approve a job for counter helper at a dry cleaning facility because it would require Claimant to stand four hours a day and to work with her arms extended at shoulder level. (EX 48). Dr. Hansen also declined to approve a greeter position at Wal-Mart because not enough information was provided, and because the description implied a lifting requirement which would be problematic with Claimant's restrictions. (EX 48). Dr. Hansen later approved the job of exit greeter at Wal-Mart after he received more information about the position. (EX 52).

In his chart note of April 11, 2005, Dr. Hansen noted that Claimant was last seen in his office on March 30, 2005 with Ms. Diane Medley. (CX 4). At that time, Claimant was very upset at the prospects of vocational assessment. Dr. Hansen reiterated that he reviewed and approved jobs which were able to be performed on a sedentary level and which would allow Claimant to frequently change in position. (CX 4). Dr. Hansen noted that Claimant suffers from chronic, recurrent major depression, which can be vocationally limiting. (CX 4). Dr. Hansen

[5] These surveillance tapes were admitted into evidence at the time of the prior hearing. However, the prior judge found that the tapes had relatively little probative value because they were not shown to any doctors for evaluation.

thought that it might be appropriate for Claimant to have a psychiatric functional capacity evaluation to determine whether the depressive aspects of Claimant's case were more limiting than any true physical limitations. (CX 4). Dr. Hansen concluded by recommending an FCE which would best guide any limitations on Claimant's ability to work. (CX 4).

Dr. Mark Ross

Dr. Mark Ross is a physician in Newport News, Virginia. (EX-32). On May 28, 2003, Dr. Ross conducted an independent medical examination of Claimant at the request of Employer. (EX-31). Claimant spent two and one-half hours at the Riverside Rehabilitation Institute during this examination. Dr. Ross reviewed Claimant's medical records dating back to 1987. After evaluating Claimant, Dr. Ross determined that Claimant was medically stable, and had reached maximum medical improvement. Dr. Ross felt that Claimant is capable of working in a sedentary capacity in which she would primarily be sitting, with the opportunity to periodically alternate to a standing position. (EX 31 at 6-7). Dr. Ross noted that a cashier position which would entail the loading of purchased items could present a problem. (EX 31 at 7). Dr. Ross concluded that a functional capacity evaluation would be helpful to better clarify Claimant's capabilities and limitations, although Dr. Ross stated that Claimant is "clearly suitable for gainful employment in some capacity." (EX 31 at 7).

Thereafter, on July 3, 2005, Dr. Ross approved a number of jobs for which he believed Claimant capable of performing within her restrictions. These positions included donation center attendant; greeter; customer service/surveyor; unarmed security guard; dispatcher; and cashier. (EX-33).

Dr. James Reid

Dr. James Reid was a shipyard physician who authored an opinion on March 26, 1998 in support of Employer's 8(f) application. (EX 9). Dr. Reid reviewed Claimant's clinic records and her outside medical records. Dr. Reid noted that he has personally treated Claimant for her 1993 shoulder injury. (EX 9). After summarizing Claimant's problems with her upper arms and hands, Dr. Reid concluded:

> Ms. Eley's disability is not caused by her 1993 right shoulder injury alone, but rather her disability is materially contributed to, and made materially and substantially worse by her pre-existing chronic hand and shoulder disability. If Ms. Eley merely had her 1993 right shoulder injury, she would continue to perform available light duty shipyard work without a pay loss. It is the cumulative effect of Ms. Eley's shoulder and arm injuries which has disabled her from work.

(EX 9).

Dr. P. Steven Apostoles

Dr. P. Steven Apostoles is the medical director at the shipyard. On January 27, 2005, he examined Claimant and reviewed Dr. Reid's 1998 8(f) application report. Dr. Apostoles agreed with the conclusions reached by Dr. Reid. Dr. Apostoles noted that Claimant's 1993 right shoulder injury was relatively minor. It was so minor, according to Dr. Apostoles, that the injury required only conservative treatment for a year. (EX 43 at 2). Dr. Apostoles noted that Claimant had very significant work restrictions prior to her 1993 shoulder injury. He explained that Claimant's right arm was already very limited in its ability due to her carpal tunnel syndrome and surgery. He elaborated on this point by explaining that Claimant could not favor the right arm with the left because the left arm was also limited by carpal tunnel and subsequent surgery. (EX 43 at 2-3).

Dr. Apostoles believes that absent her pre-existing hand and shoulder disabilities, Claimant would have at most had a minor impairment in right shoulder. Dr. Apostoles noted that he has treated numerous workers for the same or similar injuries, and these workers simply receive light duty work which does not involve overhead reaching. Dr. Apostoles found nothing on Claimant's MRI of her shoulder suggested that Claimant would have had a different result than these other workers. (EX 43 at 3). However, Dr. Apostoles explained that when the relatively minor right shoulder injury was combined with Claimant's prior arm and hand disabilities, Claimant was unable to perform even light-duty shipyard work. (*Id.*). Thus, Dr. Apostoles concluded that without the pre-existing disabilities, Claimant would have continued to work light-duty work at the shipyard without a wage loss. (*Id.*).

Vocational Evidence

Mr. William Kay is a vocational rehabilitation expert. In June 2003, Mr. Kay interviewed Claimant and conducted various vocational tests to determine if there were jobs that Claimant was able to perform. (EX 30). Mr. Kay concluded that Claimant has a variety of vocational assets, including a high school diploma, some college work, the ability to read, write, make change, and good verbal skills. In June 2003, Mr. Kay performed a labor market survey. In preparing this survey, Mr. Kay reviewed Claimant's medicals records and then applied restrictions of sedentary employment. Mr. Kay identified a variety of positions which were within Claimant's restrictions and for which Claimant was qualified: three customer service positions in Newport News and Chesapeake; two unarmed security guard positions in Newport News and Virginia Beach, and three cashier positions in Norfolk, Hampton, and Portsmouth. These jobs were all approved by Dr. Ross as suitable for Claimant given her partial disability.

Mr. Kay then updated the labor market survey in 2004 and 2005. In addition to the original jobs identified in the 2003 labor market survey, Mr. Kay also identified five additional positions which included a house sitter; door monitor; hotel security; and ticket taker. (EX 40). Dr. Ross approved these positions again, as did Dr. Hansen, Claimant's treating physician. Mr. Kay ensured that the jobs identified in the labor market survey would not be stressful for Claimant.

In 2003, Mr. Kay established that the average wage-earning capacity of the identified jobs was $6.45 per hour or $248.00 per week. The current average wage in 2005, including the five additional positions, is $6.46 per hour. Accordingly, Mr. Kay believes his original estimate of Claimant's wage earning capacity is still valid. Mr. Kay also stated that the minimum wage at the time of Claimant's injury occurred in 1993 was $4.25 per hour, which would convert to an average wage of $5.32 per hour or $212.80 per week. (EX 40).

DISCUSSION

Employer's Request for Modification

Section 22 states that any party-in-interest may, within one year of the last payment of compensation or rejection of a claim, request modification of a compensation award for mistake of fact or change in condition. 33 U.S.C. § 922. A party-in-interest can show a change in physical or economic condition. *Fleetwood v. Newport News Shipbuilding and Dry Dock Co.*, 16 BRBS 282 (1984). Under Section 22, the administrative law judge has broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971), reh'g denied, 404 U.S. 1053 (1972); *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723 (4th Cir. 1993). The scope of modification based on a mistake in fact is not limited to any particular kind of factual errors; any mistake in fact, including the ultimate fact of entitlement to benefits, may be corrected on modification. *See Metropolitan Stevedore Co. v. Rambo (Rambo I),* 515 U.S. 291, 295-296 (1997).

In this case, Employer has brought forth a claim for a Section 22 modification. Specifically, Employer argues first that the prior judge erred by characterizing Dr. Hansen as a board-certified psychiatrist and neurologist, when in fact, Dr. Hansen is not board-certified in psychiatry. Employer also contends that the prior judge wrongly assumed that Dr. Reid had not examined Claimant when in fact he had. Additionally, Employer has now obtained the opinion of Dr. Hansen, Claimant's treating physician, who has opined that Claimant is capable of sedentary work. Dr. Hansen has approved several of the positions offered by Mr. Kay in the labor market survey.

The prior judge acknowledged that no physician had completely ruled out the possibility of sedentary employment. In fact, the prior judge acknowledged that some of the physicians approved the jobs identified by Mr. Kay as suitable alternate employment. Nevertheless, the prior judge found that Employer had not met its burden of establishing suitable alternate employment because Employer failed to consult Dr. Hansen, Claimant's treating physician, on whether he thought Claimant was capable of working the positions identified by Mr. Kay. Employer has now consulted Dr. Hansen, who has approved the positions identified by Mr. Kay. In addition, the prior judge assumed that Dr. Reid had not personally examined Claimant. Employer has now submitted additional evidence of Dr. Reid's examination of Claimant.

Employer has also updated its labor market survey and has submitted an additional report in support of its 8(f) application. The new evidence submitted by Claimant clearly shows that mistakes of fact occurred during the prior proceeding. *See Wheeler v. Newport News Shipbuilding and Dry Dock Co*., 37 BRBS 107 (2003) (affirming administrative law judge's grant of modification where defendant's new evidence of suitable alternate employment justified modification of ALJ's previous permanent total disability award.) Thus, Employer has shown a basis for its modification claim and the new evidence submitted by both parties will be considered below.

Permanent Total Disability v. Permanent Partial Disability

To establish a *prima facie* case of total disability under the Act, the claimant must show that she is unable to return to her pre-injury employment. The burden then shifts to the employer to show that suitable alternate employment is available for the claimant, given the claimant's physical and educational ability, age, and experience. If the employer then establishes the availability of suitable alternate employment, the burden then shifts back to the claimant to show that she diligently tried and was unable to secure employment. *Trans-State Dredging v. Benefits Review Bd.* (*Tarney*), 731 F.2d 199, 201-02, 16 BRBS 74, 76 (4th Cir. 1984). If the claimant is unable to show that she diligently searched for work but was unable to secure it, then at most her disability is partial, not total. *Southern v. Farmers Export Co.,* 17 BRBS 64 (1985).

The parties have stipulated that Claimant is unable to return to her pre-injury employment. Thus, the employer must show that suitable alternative employment is available for the claimant. Employer has satisfied this burden with the labor market survey conducted by William Kay, as well as the specific positions identified by Mr. Kay as suitable for Claimant. The labor market survey shows that Claimant is able to perform a variety of jobs within her physical restrictions and given her experience and abilities. Mr. Kay conducted this labor market survey in 2003, and then updated it again in 2005 to provide the most accurate information. Additionally, the positions identified by Mr. Kay have been approved by both Dr. Ross and Dr. Hansen as suitable positions for Claimant. Dr. Hansen's approval is especially persuasive given that he has treated Claimant for her pain issues for an extended period of time, and had previously expressed reservations about Claimant's ability to work at all. Dr. Hansen approved the jobs identified by Employer in August 2004, and again in February and April 2005. (EX 39, EX 48, CX 4).

As Employer notes, none of the physicians in this case – including Claimant's treating physician – have opined that Claimant is unable to work. Claimant stresses, however, that Dr. Hansen expressed concerns in April 2005 that Claimant's depression could be vocationally limiting, and suggested that Claimant perhaps undergo a psychiatric functional capacity evaluation ("PFCE"). It should first be noted that Dr. Hansen is not a psychiatrist, but rather a neurologist.[6] Second, the record does not contain any evidence that Claimant participated in a

[6] This fact is especially important because the prior judge mischaracterized Dr. Hansen as both a psychiatrist and a neurologist. (JX 1 at 5). Given that Claimant has experienced chronic difficulties with depression, it is important that the specialties of Claimant's treating physicians are correctly identified so that their opinions on Claimant's various ailments can be properly weighed. The parties stipulated that Dr. Hansen is a neurologist, but not a psychiatrist.

PFCE at anytime after this suggestion was made. Third, Claimant was evaluated by Dr. Mansheim, an Employer-chosen psychiatrist, in June 2005 for an independent medical examination. (EX 55). Following the examination, Dr. Mansheim concluded that Claimant did not suffer from a psychiatric disability which would prevent her from working in a sedentary position. Thus, I do not find that Dr. Hansen's peripheral concerns about Claimant's depression rise above the overwhelming evidence provided by Employer of Claimant's ability to work in a sedentary position.

Employer's burden is further supported by the testimony of Claimant, as well as surveillance videos taken of Claimant. Claimant testified that she has volunteered at the YMCA for several years watching small children in their daycare center. Claimant attends this volunteer work even though she receives no monetary compensation and contends that she is unable to take use of the free pool membership due to her pain. The surveillance videos show Claimant able to drive a car, pick up packages, and shop in stores. Thus, I find that Employer has satisfied its burden of establishing suitable alternate employment for Claimant.

Claimant may still be entitled to permanent total disability if she can show that she diligently searched for work but was unable to secure it. However, the parties stipulated that Claimant has not looked for work since 2002. Therefore, I find that Claimant is not entitled to permanent total disability. Instead, I find that Claimant is capable of working 40 hours per week at a sedentary job.

Claimant's Wage Earning Capacity

Under Section 8(c)(21) of the Act, if a claimant experiences a loss in wage-earning capacity as a result of her unscheduled injury, she is entitled to an award of permanent partial disability compensation based on the difference between her pre-injury average weekly wage ("AWW") and her post-injury wage-earning capacity. 33 U.S.C. § 908(c)(21). Employer contends that Claimant has a wage-earning capacity of $258.40 per week and, therefore, is entitled to permanent partial disability compensation of $129.06 per week ($451.60-$258.40 x 2/3). Employer calculated this figure by obtaining an average hourly wage of $6.46 from the positions identified as suitable alternate employment. However, a disabled worker's post-injury earnings can only 'fairly and reasonably represent his wage-earning capacity,' if they have been converted to their equivalent at the time of injury. *See e.g. La Faille v. Benefits Review Bd.,* 884 F.2d 54, 61, 22 BRBS 108, 120 (2d Cir. 1989). Thus, in order for $258.40 per week to accurately represent Claimant's wage earning capacity, this figure would have to be adjusted downward to accurately represent inflation since Claimant's injury in 1993. The Benefits Review Board has held that the national average weekly wage for each year should be used to adjust the claimant's post-injury wages downward to the time of the claimant's injury.[7] *Quan v. Marine Power & Equipment Co.*, 30 BRBS 124 (1996). *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). Therefore, we will use Claimant's current wage-earning capacity of $258.40 per week, as identified by Mr. Kay, to determine what Claimant was capable of earning

[7] The National Average Weekly Wages can be located at: http://www.dol.gov/esa/owcp/dlhwc/NAWWinfo.htm.

in 1993 dollars. When this figure is adjusted using the NAWW, Claimant's average weekly wage-earning capacity in 1993 dollars is $177.95.[8]

Thus, when Claimant's post-injury wage earning capacity, adjusted downward, is subtracted from her pre-injury average weekly wage of $451.60, Claimant is entitled to $180.60 per week in compensation.[9] Employer requests that Claimant's disability be changed effective May 13, 2003[10], which was the date of Mr. Kay's first labor market survey report in this case. (Emp. Brief at 27). However, my review of Mr. Kay's first labor market survey report, located at EX-30, reveals that it was dated June 10, 2003. Employer's request to use Mr. Kay's labor market survey report is granted, and Claimant's award of compensation will be changed to an award of permanent partial disability of $180.60 beginning June 10, 2003, through the present and continuing.

SECTION 8(f) RELIEF

Section 8(f) shifts the liability to pay compensation for permanent disability after 104 weeks from an employer to the Special Fund, as established in Section 44 of the Act. 33 U.S.C. §§ 908(4), 944. In a case where the claimant is permanently partially disabled, the employer may receive Special Fund relief if it establishes that (1) the claimant had a pre-existing permanent partial disability; (2) the pre-existing disability was manifest to the employer prior to the work-related injury; and (3) the ultimate permanent partial disability is not due solely to the work injury and that it materially and substantially exceeds the disability that would have resulted from the work-injury alone. 33 U.S.C. §908(f).

The employer must present evidence of the type and extent of disability that the claimant would suffer if not previously disabled when injured by the same work-related injury. *Newport News Shipbuilding and Dry Dock Co. v Ward*, 326 F.3d 434, 443, 37 BRBS 17, 23 (4th Cir. 2003). The Fourth Circuit requires the employer to quantify the level of impairment that would have ensued from the work injury alone. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co*. [*Harcum I*], 8 F.3d 175, 27 BRBS 116 (4th Cir. 1993), *aff'd* 514 U.S. 122, 29 BRBS 87 (1995). The employer is not required to establish the contribution element by virtue of a

---

[8] The formula is as follows: $\frac{\text{NAWW 1993}}{\text{NAWW 2005}} = \frac{\text{Claimant's post wage earning capacity in 1993 dollars (unknown)}}{\text{Claimant's post-injury wage earning capacity in 2005 dollars.}}$

Thus, where "x" represents Claimant's post-injury wage-earning capacity in 1993 dollars:

$\frac{\$360.57}{\$523.58} = \frac{x}{\$258.40} \rightarrow \$93{,}171.28 = \$523.58(x) \rightarrow x = \$177.95.$

[9] $451.60 (Claimant's pre-injury AWW) - $177.95 (Claimant's post-injury adjusted average weekly wage-earning capacity) = $273.65. $273.65 x 2/3 = $180.60.

[10] In the argument portion of Employer's brief, Employer requests that Claimant's award be changed to May 19, 2003. (Emp. Brief at 18). Upon reviewing the labor market survey, I discovered that the file was referred to Mr. Kay on May 19, 2003, and the report was completed on June 10, 2003. Accordingly, it appears that Employer inadvertently misstated the date which it seeks to use, which appears, from the context of its argument, to be June 10, 2003.

single medical opinion, nor is the employer required to establish the contribution element by medical evidence. *See Ward, above.*

At the prior hearing, Employer submitted a report from Dr. Reid in support of its 8(f) application. The prior judge rejected Dr. Reid's opinion, in part, because he "based his opinion only on records and did not examine Claimant." (JX 1 at 9). Employer states that this was a mistake of fact as Dr. Reid did personally examine the Claimant. Employer has now submitted evidence consisting of a chart note from Dr. Reid which establishes that he did examine Claimant. Additionally, the report submitted by Dr. Reid at the time of the prior hearing contained a statement from Dr. Reid that he treated Claimant for her injury. (EX 9). Thus, Dr. Reid clearly did examine Claimant. However, Employer has now also submitted the opinion of Dr. Apostoles, who examined Claimant, reviewed her medical records, and also found that Claimant's ultimate disability was materially and substantially worse as a result of her pre-existing disabilities. I will, therefore, evaluate the reports of both Dr. Reid and Dr. Apostoles to determine whether they meet the requirements for 8(f) relief under Fourth Circuit case law.

At the outset, the Director argued in his brief that Fourth Circuit case law requires the employer to list all pre-existing disabilities on which it bases its application at the time the application is made. The Director argues, therefore, that the 8(f) claim in this case must be limited to Claimant's pre-existing chronic hand and shoulder disabilities, as those were the only pre-existing disabilities listed on the 8(f) application at the time it was submitted. The Director contends that Employer's 8(f) application can not be based in any way on Claimant's pre-existing back and leg disabilities. Accordingly, the Director argues that Employer has failed to establish its entitlement to 8(f) relief because the medical evidence of record does not establish that Claimant's ultimate disability is materially and substantially greater as a result of her pre-existing chronic hand/shoulder disability.

Employer responded to this argument by noting that Claimant's back and leg disabilities were not raised as 8(f) conditions at the time of application because they did not prevent Claimant from performing sedentary work. In the alternative, however, Employer claims the back and leg disabilities as pre-existing conditions for which Section 8(f) relief should be based.

The Director's argument with respect to Claimant's pre-existing back and leg disabilities has merit. The Fourth Circuit has held that the language of Section 8(f) requires that the employer present its grounds for relief to the district director before the district director considers the claim. *Director, OWCP v. Newport News Shipbuilding and Dry Dock Co. (Dillard)*, 230 F.3d 126, 34 BRBS 100 (4th Cir. 2000). Thus, Employer was required to state all pre-existing conditions on which it was basing its application at the time the 8(f) claim was submitted for consideration by the district director. The only exception to this requirement arises in situations where the employer could not have reasonably anticipated the special fund's liability with regard to particular injuries. In reviewing Employer's 8(f) application dated March 26, 1998, the only pre-existing disability listed is "Chronic Hand/Shoulder pain". In this case, I do not find that Employer could not have reasonably anticipated the Special Fund's liability with regard to Claimant's pre-existing back and leg injuries. Claimant's pre-existing back and leg disabilities and the resulting restrictions from those disabilities were well documented before Claimant's April 1993 right shoulder work injury occurred and were clearly known to Employer. Many

references to these disabilities were contained within the medical records submitted with Employer's 8(f) application in March 1998. Accordingly, Employer's 8(f) application and supporting arguments will only be evaluated with respect to Claimant's pre-existing chronic hand/shoulder injuries and her right shoulder work injury of April 1993. Therefore, Employer must establish that Claimant's ultimate disability following her April 1993 right shoulder injury was materially and substantially greater than it would have been due to her pre-existing chronic hand/shoulder pain.

In support of its 8(f) application, Employer submitted detailed reports from Drs. Reid and Apostoles. The Director argues that Dr. Reid's opinion fails to quantify the extent of disability from Claimant's 1993 work-injury alone. With respect to Dr. Apostoles' 2005 opinion regarding 8(f) relief, the Director concedes that "Doctor Apostoles' report appears to quantify the extent of disability due to Claimant's work-related shoulder injury alone." However, the Director contends that Dr. Apostoles fails to attribute any increased disability to the pre-existing conditions on which Employer's 8(f) application is premised.

In 1998, Dr. Reid reviewed Claimant's extensive medical records and wrote a two-page detailed report, detailing the chronology, symptoms, and restrictions associated with Claimant's multiple injuries. (EX 8). Dr. Reid opined that if Claimant had only incurred her 1993 right shoulder injury, she could have continued to perform light duty shipyard work without a pay loss. (EX 9). Prior to her 1993 right shoulder injury, Claimant worked as a clean-up worker at the shipyard. (EX 18). However, it was the cumulative effect of Claimant's previous shoulder and arm injuries – for which she received permanent light duty restrictions before her 1993 right shoulder injury – which disabled her from work. (EX 9).

Dr. Reid's conclusions are supported by the thorough report of Dr. Apostoles. Dr. Apostoles is currently the medical director at Northrop Grumman Newport News (Employer). (EX 44). Like Dr. Reid, Dr. Apostoles had the opportunity to personally examine Claimant in January 2005. (EX 43). Dr. Apostoles also reviewed Dr. Reid's Section 8(f) application report of March 26, 1998. After evaluating Claimant and reviewing Dr. Reid's report, Dr. Apostoles concluded that he was in agreement with Dr. Reid's opinions.

Dr. Apostoles believes that Claimant's 1993 right shoulder was not a serious injury, and would not, by itself, have limited Claimant to working only sedentary jobs. In support of this statement, Dr. Apostoles stated that the 1993 shoulder injury involved "very little force". (EX 43). Dr. Apostoles noted that Claimant's right shoulder injury only required conservative treatment for the first year. Dr. Apostoles reviewed the notes and MRI reports taken by Dr. Ross of Claimant's right shoulder; Dr. Apostoles found nothing in the reports which would have precluded shipyard light duty work. Dr. Apostoles also explained that following Claimant's carpal tunnel injuries, which were more significant and severe injuries than her 1993 right shoulder injury, Claimant was still able to perform light duty work at the shipyard. (EX 43). Accordingly, Dr. Apostoles believes that without the pre-existing disabilities, Claimant would have had no trouble continuing light duty work following her milder, 1993 right shoulder injury. (EX 43). With only the right shoulder injury, Claimant would have been able to perform light duty shipyard work which did not involve overhead reaching. (EX 43).

The opinions of physicians submitted to establish the contribution element in Special Fund cases are often found by the courts to be "conclusory and lacking in evidentiary support." *See e.g. Newport News Shipbuilding and Dry Dock Co., v. Director, OWCP (Ward),* 326 F.3d 434, 37 BRBS 17 (4th Cir. 2003) (affirming an ALJ's finding that physician's opinion was conclusory, where physician did not refer to any evidence justifying his conclusion and where physician failed to explain how he arrived at his opinion). However, I find that the basis and logic of Dr. Apostoles' conclusions are thoroughly explained within his opinion. Dr. Apostoles, who has worked as the shipyard doctor for a number of years, noted that numerous workers at the shipyard have similar shoulder injuries, and they normally return to light duty or even to regular, unrestricted work. (EX 43). Dr. Apostoles has previously treated numerous shipyard workers with similar or worse right shoulder injuries who were subsequently able to return to light duty shipyard work. (EX 43). After reviewing Claimant's records and films, Dr. Apostoles found nothing which would indicate that Claimant's right shoulder injury would have resulted in different circumstances. (EX 43). Thus, Dr. Apostoles' conclusion that Claimant could have returned to a light duty job had she only suffered the 1993 right shoulder injury is supported by Dr. Apostoles' extensive experience in treating these injuries and in his comparison of Claimant's specific circumstances to other workers who have suffered a similar or the same injury.

Additionally, the opinions of Drs. Reid and Apostoles are supported by the Claimant's medical records from various doctors, which establish that Claimant's chronic hand and shoulder pain has presented continual problems throughout the years and has limited Claimant's ability to perform various jobs. As Dr. Reid noted, Claimant began having problems with her hands in April 1984. (EX 9). Claimant's chronic hand and shoulder pain led Dr. Rafii to diagnose Claimant with myofascial dysfunctional pain syndrome in January 1990. (EX 8 at 11). Claimant was given permanent restrictions for her hands on May 1, 1991. (EX 8 at 21). Claimant's chronic pain syndrome was again reaffirmed in September 1992 when Dr. Reid noted that Claimant's "failure to respond to multiple upper extremity surgeries related to the same work incident indicates chronic pain behavior." (EX 8 at 30).

Additionally, the records of Dr. Stiles, who treated Claimant at the time of her 1993 right shoulder injury, illustrate the complications presented by Claimant's chronic hand and shoulder pain. In November 1994, Dr. Stiles issued restrictions for Claimant, including minimum use of her right hand. (EX 18). On May 30, 1995, Dr. Stiles issued permanent restrictions for Claimant which included no lifting with her right hand or arm and no use of implant tools with her right hand. (EX 18). In his January 9, 1995, office note, Dr. Stiles noted that Claimant had returned for treatment because of pain and difficulty with her right shoulder. Dr. Stiles then wrote that Claimant's [shoulder] pain "has certainly been complicated by her hand and elbow problems." (EX 18). Dr. Stiles also noted on April 28, 1998 that Claimant's pain has increased since she was moved from a job as a greeter at the Langley PX to a job as a checker where she was required to lift bags. Dr. Stiles opined that Claimant "needs to return to a job which does not require such extensive use of her upper extremities." (EX 18). The difficulties that Claimant experienced in her hands from the PX cashier job are also reflected in Dr. Hansen's office notes of that time period. See (EX 25 at CX1k-q). Dr. Hansen's chart notes also reflect that Claimant returned for treatment and flare-up of her carpal tunnel syndrome and for pain in her hands. (EX 25 at CX-1zzz).

I find the Section 8(f) reports submitted by Drs. Reid and Apostoles, both of whom personally examined Claimant, to be well-documented and supported by the evidence. Accordingly, I find that the evidence submitted by Employer establishes that it is entitled to Special Fund relief. First, Claimant had pre-existing permanent disabilities to her hand and shoulder. Second, these disabilities were manifest to Employer. Third, Claimant's ultimate disability following her 1993 right shoulder injury was made materially and substantially worse as a result of her pre-existing chronic hand/shoulder pain. Employer has established this third and final element by showing that if Claimant had only suffered the 1993 right shoulder injury, she would have returned to light duty shipyard work with only overhead reaching restrictions. Instead, Claimant's chronic pain syndrome, with respect to her hands and shoulder, combined with her 1993 shoulder injury, has made it impossible for Claimant to return to any regular or light-duty shipyard work. Furthermore, the combination of these injuries has resulted in a disability that has limited the types of sedentary jobs which Claimant can perform, as evidenced by Claimant's difficulty in working as a cashier where she had to lift and handle heavy bags. Thus, Employer has shown that Claimant's pre-existing chronic hand/shoulder pain, when combined with her 1993 right shoulder injury, resulted in a materially and substantially greater disability than the disability which would have resulted from the 1993 right shoulder injury alone.

CONCLUSION

Claimant's compensation award of April 22, 2004, is hereby modified. Claimant's award shall be modified from an award of permanent total disability to one of permanent partial disability. Additionally, Employer's application for Section 8(f) relief is granted.

ORDER

1. Employer's request for a modification of the April 22, 2004, compensation order is GRANTED.

2. Claimant's award has been modified from an award of permanent total disability to permanent partial disability.

3. Claimant is entitled to a permanent partial disability compensation award in the amount of $180.60 per week beginning June 10, 2003, through the present and continuing.

4. Employer's request for Special Fund relief is GRANTED.

5. The Special Fund shall reimburse Employer for any and all overpayment of compensation.

6. Within thirty (30) days of receipt of this decision and order, Claimant's attorney shall file a fully supported and fully itemized fee petition, serving a copy thereof on Employer's counsel, who shall then have ten (10) days to respond thereto.

SO ORDERED.

A

Daniel A. Sarno, Jr.
Administrative Law Judge